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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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The National Association of Regulatory Utility Commissioners (NARUC), Petitioner, hereby submits its brief in reply to the brief for the United States (Government) and the briefs of various *amici* filed in support of the Government.

INTRODUCTION

In its opening brief, the NARUC argued that under the facts presented in this case, the five State regulatory commissions need not compel regulated intrastate motor car-

riers to file only collective rate proposals in order for the collective ratemaking activities of these carriers to be immune from Federal antitrust liability under the State action doctrine. Relying on such recent decisions of this Court as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*) and *Hoover v. Ronwin*, ____ U.S. ____, 80 L.Ed.2d 590 (1984), the NARUC asserted that the collective activities herein under consideration were exempt from antitrust proscription because they were undertaken pursuant to clearly articulated and affirmatively expressed State policies and because they were actively supervised by the regulatory commissions of the respective States.

In its brief, the Government disagrees, arguing that the collective ratemaking activities of the motor carriers must be literally compelled by the States if antitrust immunity is to attach. The NARUC believes that in conjunction with the other petitioners, it has refuted this position, and therefore will not burden the Court by repeating earlier arguments. We file this brief, however, to reply to new issues raised in the briefs of *amici* in support of the Government. Specifically, we wish to briefly reply to the Amici Curiae Brief for the State of Iowa and the States of Wisconsin, Delaware, Rhode Island, and Indiana (The Attorneys General) and to the Amici Curiae Brief of the National Small Shipments Traffic Conference and Drug and Toilet Preparations Traffic Conference (the Shippers).

ARGUMENT

I. REPLY TO THE ATTORNEYS GENERAL

It is truly remarkable that in their brief the Attorneys General advance positions which would direct the Federal

courts to review the need for and wisdom of State regulatory activities under the guise of Federal antitrust review. Yet, throughout their brief, these State officials ask this Court to review State regulatory policies to determine whether these policies are wise, or whether they have been adopted for "legitimate" purposes. We strongly urge the Court to reject this analysis.

A. The Attorneys General Preemption Argument

In Part I of their brief (at 3-7), the Attorneys General argue that State collective ratemaking policies are *preempted* by Federal antitrust laws *even if these policies compel collective rate submissions* (at 6-7). The Attorneys General assert that the reasons why the States adopt such a policy should be assessed, and if these reasons are not good enough (in the opinion of a Federal court), State regulatory policy must give way. (*Id.*)

This preemption argument cannot withstand scrutiny. Plaintiffs challenging State or local regulation on the ground that such governmental actions are preempted by Federal antitrust law bear the heavy burden of overcoming the presumption "that preemption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States." *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 61 (1982) (Rehnquist, J. dissenting, joined by the Chief Justice and Justice O'Connor). In effect, preemption analysis places States in a stronger position to defend their actions than does exemption analysis. Yet, despite invoking preemption analysis, the Attorneys General fail to apply or even acknowledge the analysis described in Justice Rehnquist's opinion, instead offering spurious examples of State actions that would be preemp-

tible because they implement insufficient or unwise State interests. The irony here is palpable. Justice Rehnquist offered preemption analysis as a way for Federal courts *to avoid* assessing the legitimacy of "State interests" or the reasonableness of State regulatory policies and procedures. 455 U.S. at 65-70 ("the State . . . should not be hauled into federal court in order to justify its decision that competition should be replaced with regulation." *Id.* at 70).

In the final analysis, the Attorneys' General preemption argument (which is clearly not Justice Rehnquist's preemption analysis) must fail because it calls upon the Federal courts to sit as "super legislatures", reviewing the wisdom and reasonableness of State legislation and regulations. Applied broadly, the Attorneys' General position would call into question every State and local enactment which might have even minor anticompetitive effects. Clearly, this Court could not sanction such an outcome.

B. The Attorneys General State Action Argument

The State action argument offered in the Attorneys General brief (at 7-14) contains the same basic flaws as their preemption analysis. Here too these State officials ask this Court to assess the legitimacy of the State interests in maintaining the current collective ratemaking system. Finding these interests insubstantial and unworthy of consideration, the Attorneys General conclude that the State action exemption should not apply because the State regulatory commissions, in league with intrastate motor carriers, have lost sight of the public interest (at 13-14). These contentions cannot go unchallenged.

First, there is absolutely no support in the record for this Court to conclude that the State regulatory commis-

sions have abandoned the public interest for purposes of administrative convenience, or indeed, for any other reason. Rather, the record contains ample evidence documenting the close scrutiny to which motor carrier rate proposals are subjected by the State commissions (E.G. see Affidavit of J.C. Turner, J.A. 50-54). Indeed, the fact that the States closely and actively supervise motor carrier ratemaking activities has never been challenged by the Government in this case. Therefore, any contentions that the States have abandoned the public interest in just and reasonable motor carrier rates is simply wrong.

More importantly, the reasons why the States have adopted their current collective ratemaking policies are not relevant to the application of the State action doctrine Under the test announced by the Court in *Midcal,* State policies on collective ratemaking are exempt from antitrust proscription if they are clearly articulated, affirmatively expressed, and actively supervised. The issue before the Court is whether a State must compel anticompetitive activities as the only way of proving that its regulatory policies are clearly articulated and affirmatively expressed.

However, the wisdom of the State ratemaking policies or the reasons for their adoption *are not in issue,* nor should they be. In the early years of this century, this Court invoked the Fourteenth Amendment to undertake a searching analysis of the wisdom and legitimacy of State regulatory policies and enactments. During this, the so-called *Lochner* era (from *Lochner v. New York,* 198 U.S. 45 (1905)), this court invoked the doctrine of substantive due process to strike down State labor laws, child welfare statutes and other social welfare legislation on the ground that these enactments were based upon insufficient motives, unworthy purposes, or illegitimate goals.

This Court has abandoned the substantive due process era, and therefore, no longer questions, on Fourteenth Amendment grounds, the motives of a State's exercise of its police powers. By urging this Court to examine the motives of the States in this case, the Attorneys General seem to advocate a return to the *Lochner* era. They believe that Federal courts must assess the motives of a State's regulatory program under the antitrust laws, and further, must strike down State enactments resting upon insufficient motives, unworthy purposes, or illegitimate goals. We urge this Court to firmly reject this view of the State action exemption, which threatens not only State motor carrier regulation, but every State or local regulatory program having any anticompetitive effect.

In the final analysis, the Attorneys General object to intrastate collective ratemaking because, in their opinion, it is unwise public policy. This court, however, is not the forum in which to argue the merits of collective ratemaking. The Attorneys General have ample remedies if they wish to eliminate collective ratemaking in their respective jurisdictions: they may petition their legislatures to abolish the practice, or they may bring law suits in State Court under State antitrust laws. They must not, however, be permitted to litigate the wisdom of State policies in light of Federal antitrust law in Federal Court.

II. REPLY TO THE SHIPPERS

The NARUC wishes to briefly reply to the Shippers' request that "this Court make it clear in its opinion that if State-mandated collectively-made rates are to be immunized, their carriers may be left free to publish individual discount tariff items". (Shippers Br. at 14). Despite their support for the Government's compulsion

argument, the shippers are obviously fearful that the States will take one of the two options available, and compel collective ratemaking of *all* intrastate rates.

The NARUC stongly objects to any suggestion that this Court, in effect, write new statutes for the States in this area of regulation. Should the Court affirm, it should not then tell the States that it would be somehow better if they were to abolish, rather than compel, collective actions. Moreover, we are puzzled by the Shippers' conclusion that the system they advocate (collectively-made maximum rates with individual discounts permitted) differs in any material way from the ratemaking systems now in effect. If the Shippers want a regulatory system combining the benefits of collective ratemaking *and* independent action, they are on the wrong side of the case. They should be supporting the position of the NARUC that the States must have the flexibility, without fear of antitrust proscription, to tailor their regulatory systems to the needs of the consumer interests that the Shippers represent. In sum, we agree with the Shippers that "State-mandated collectively set rates can coexist along side individual carrier-made rates which are not collectively set." (*Id.*) We hope the Court also agrees.

CONCLUSION

Beginning in the District Court, the NARUC has argued that the State regulatory commissions are the real parties in interest in this litigation. Despite the Government's repeated attempts to suggest that these State agencies will be unaffected if this Court affirms (Government Br. at 30, n. 25), the briefs of the Attorneys General and the Shippers make it quite clear that the issues herein under consideration lie at the core of the respective State regulatory

programs. Quite surprisingly, the Attorneys General, *who are also State officials,* have urged this Court to sanction the direct intrusion of the Federal judiciary into the regulatory affairs of the State through the antitrust laws. We respectfully request this Court to forcefully reject the position that these laws authorize federal judges to assess the wisdom or purposes of State regulatory enactments. Moreover, we respectfully request that the decision of the Court of Appeals herein under review be reversed.

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